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No. 08-1361

In the
Supreme Court of the United States

SWISHER INTERNATIONAL, INC.,
Petitioner,
v.
TOM VILSACK, Secretary of Agriculture,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to this Court's Rule 37.2(b), Pacific Legal Foundation and Southeastern Legal Foundation respectfully move this Court for leave to file the attached brief amicus curiae in support of the petition for writ of certiorari.[1] Pursuant to Rule 37.2(a), on or about May 6, 2009, counsel for Pacific Legal Foundation sent letters to counsel for both Petitioner Swisher International, Inc., and Respondent Tom Vilsack, giving notice of Pacific Legal Foundation's intent to file a brief on behalf of itself and other appropriate parties on or before June 4, 2009, and requesting written consent to file the brief. Counsel for Petitioner Swisher International, Inc., consented to the filing of this brief and such consent has been lodged with the Clerk of the Court. Counsel for Respondent Tom Vilsack, however, did not respond in any form before the filing of this brief, despite repeated requests by counsel for Pacific Legal Foundation.

INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property, individual liberty, and economic freedom. Founded over 35 years ago, PLF is the largest and most experienced legal organization of its

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

kind. PLF maintains its headquarters in Sacramento, California, and has regional offices in Bellevue, Washington, and Stuart, Florida. The Foundation is supported primarily by donations from individuals interested in the preservation of traditional individual liberties. PLF attorneys have considerable experience litigating, as lead counsel and amicus curiae, in defense of constitutionally protected property rights. PLF attorneys have regularly appeared before this Court as lead counsel on behalf of landowners whose ability to use their property was unlawfully curtailed. *See Rapanos v. United States*, 547 U.S. 715 (2006); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF also routinely participates in important property rights cases as amicus curiae. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

Southeastern Legal Foundation, Inc. (SLF), founded in 1976, is a national public interest law firm and policy center that advocates constitutional individual liberties, free enterprise and private property rights in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court of the United States. *See, e.g.*, *Suitum*, 520 U.S. 725; *Nollan*, 483 U.S. 825; *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas*, 505 U.S. 1003; *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436 (2009). SLF has been involved in litigation and public policy initiatives dealing with regulatory and property takings related to private property, as well as the imposition of state and local government fees. *Glisson v. Alachua County*, 558 So. 2d 1030 (Fla. Dist. Ct. App.

1990); *City of Stockbridge v. Meeks*, 283 Ga. App. 343 (2007) (eminent domain "takings").

The instant petition raises a significant question of federal law as to whether the Takings Clause of the Fifth Amendment applies to property in the form of money. PLF and SLF attorneys have a wealth of experience on this issue, having acted as lead counsel in cases questioning whether money is "property" within the meaning of the Fifth Amendment. *See, e.g.*, *City of Olympia v. Drebick*, 126 P.3d 802 (Wash. 2006); *Greater Atlanta Home Builders Ass'n v. City of Atlanta*, 149 Fed. Appx. 846 (11th Cir. 2005), *cert. denied*, 547 U.S. 1147 (2006). PLF and SLF attorneys participated as amicus in cases that have examined whether money is "property" within the meaning of the Fifth Amendment. *See, e.g.*, *McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008). PLF attorneys have also published law review articles relating to Fifth Amendment jurisprudence. *See, e.g.*, J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go From Here*, 59 Wash. & Lee L. Rev. 373 (2002). SLF attorneys drafted model state legislation in 2006 and 2007 providing significant reform of state eminent domain proceedings and limiting the power of local governments to condemn private property for the purposes of redevelopment. The model legislation was adopted and enacted in Georgia and served as a blueprint for similar reforms adopted in other states. PLF and SLF believe their experience in litigating and publishing on matters pertaining to federal takings claims will assist this Court in deciding whether to grant the petition in this case.

For all the foregoing reasons, the motion of Pacific Legal Foundation and Southeastern Legal Foundation to file a brief amicus curiae should be granted.

DATED: June, 2009.

Respectfully submitted,

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QUESTIONS PRESENTED

The Fair and Equitable Tobacco Reform Act, Pub. L. No. 108-357, 118 Stat. 1524 (codified at 7 U.S.C. § 518, *et seq.* (2004)) (FETRA) requires one class of private parties (cigar manufacturers) to make hundreds of millions of dollars in payments for the benefit of another class of private parties (former beneficiaries of the recently discontinued federal tobacco price support program), despite the absence of any meaningful connection between the parties Congress sought to assist and those Congress singled out to be burdened.

The court of appeals, relying heavily on this Court's splintered decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), held that monetary assessment schemes are not cognizable under the Takings Clause at all, and that, unlike the statute struck down in *Apfel*, FETRA comports with Due Process because it is not "retroactive."

The questions presented are:

1. Whether the monetary assessment schemes are *per se* immune from Takings Clause scrutiny on the ground that money is not "property" within the meaning of the Fifth Amendment?

2. Whether the highly deferential standard that governs Due Process challenges to ordinary regulatory or taxing legislation is appropriate where the law at issue effects a direct wealth transfer from one class of private parties to another?

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STATEMENT OF THE CASE

This case involves a constitutional challenge under the Takings Clause of the Fifth Amendment to the Fair and Equitable Tobacco Reform Act, Pub. L. No. 108-357, 118 Stat. 1524 (codified at 7 U.S.C. § 518, *et seq.* (2004)) (FETRA), a statute which forces the Petitioner to subsidize a buyout of tobacco growers.

In 1938, Congress implemented a system of quotas and price controls, to be administered by the Department of Agriculture, in an effort to address fluctuations in the price of various commodities, including tobacco, and their effects on farm incomes. *See* Pub. L. No. 75-430, 52 Stat. 31 (codified as amended in various sections of 7 U.S.C.); *see generally Wickard v. Filburn*, 317 U.S. 111, 115 (1942). Six decades later, Congress decided to end the tobacco price support program. However, members of Congress realized that a sudden discontinuation of the program would have harsh results for tobacco farmers who depended on the program. *Tobacco Quota Buyout: Hearing Before the House Committee on Agriculture*, 108th Cong. 4 (2003), at 18. Concluding that a "buyout" program would ease the transition to a free market system, Congress passed FETRA which provided that former program participants would be entitled to payments of $9.6 billion over a ten-year period. However, FETRA payments do not come from the general treasury, but are funded solely through monetary assessments levied against private parties, namely the manufacturers and importers of tobacco products such as the Petitioner, Swisher International, Inc.

After tendering its first FETRA payments and exhausting its administrative remedies, Petitioner sued the Secretary of Agriculture, arguing in part that FETRA violates the Takings Clause of the Fifth Amendment. Specifically, Petitioner claimed that the payments it was forced to make under FETRA were an unconstitutional taking, relying on *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123-28 (1978), and the plurality opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). The government defended FETRA by maintaining that the Takings Clause is *per se* inapplicable to statutes requiring the payment of money.

The district court denied Petitioner's takings claim, stating that the Takings Clause is not implicated when one party is required "to use his or her assets for the benefit of another." *Swisher Int'l, Inc. v. Johanns*, No. 3:05-cv-871-J16-TEM, 2007 WL 4200816, at *10 (M.D. Fla. Nov. 27, 2007) (not reported). The Eleventh Circuit affirmed, holding that the Fifth Amendment's Takings Clause is "not an appropriate vehicle to challenge the power of Congress to impose a mere monetary obligation." *Swisher Int'l, Inc. v. Schafer*, 550 F.3d 1046, 1056 (11th Cir. 2008). The court reasoned that the Takings Clause does not apply to a taking of money, but instead "operates only as a conditional limitation, permitting the taking so long as the government pays just compensation," and is not "'a substantive or absolute limit on the government's power to act.'" *Id.* at 1055 (quoting *Eastern Enters.*, 524 U.S. at 545). Petitioner now seeks this Court's review, asking in part whether a statutory

obligation to pay money for a public purpose is subject to takings analysis.[2]

The Eleventh Circuit's decision that a taking of money is exempt from the protections of the Fifth Amendment conflicts with this Court's traditional and more recent decisions interpreting the Takings Clause. It also undermines the Takings Clause protections against unlawful permit conditions articulated in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), by allowing governments to make monetary exactions free of takings scrutiny. The Petition accordingly presents a constitutional issue of significant national importance, which warrants this Court's review.

ARGUMENT

I

THE LOWER COURT'S DECISION CONFLICTS WITH THIS COURT'S UNDERSTANDING OF THE SCOPE OF THE TAKINGS CLAUSE

A. This Court's Jurisprudence Is Designed To Protect All Forms of Private Property

This Court has recognized that the purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a

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[2] Petitioner also raised claims under the Fifth Amendment's Due Process Clause and the Fourteenth Amendment's Equal Protection Clause. Although supportive of these claims, *Amici* PLF and SLF do not address those claims here.

whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also* James L. Huffman, *Colloquium on* Dolan*: The Takings Clause Doctrine of the Supreme Court and the Federal Circuit:* Dolan v. City of Tigard*: Another Step in the Right Direction*, 25 Envtl. L. 143, 152 (1995) ("The takings clause . . . protects against this majoritarian tyranny . . . by insisting that the costs imposed by government use or regulation of private property are borne by all to whom the benefits inure.").

The drafters of the Fifth Amendment understood that the term "property" was and would have to be broadly construed to fulfill the purposes of the Takings Clause. Thus, the Constitutional Framers eschewed legalistic and artificially narrow definitions of property, believing instead that the term "embraces every thing to which a man may attach a value and have a right." James Madison, *Property* (Mar. 27, 1792).[3] Included within this understanding is the principle that "a man's land, or merchandise, or *money* is called his property." *Id.* (emphasis added).

This Court long ago rejected rigid definitions of what is "property" within the meaning of the Takings Clause. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984) (That trade secrets are protected property interests "is consonant with a notion of 'property' that extends beyond land and tangible goods and includes the products of an individual's 'labor and invention.' 2 W. Blackstone, Commentaries *405; *see generally* J. Locke, The Second Treatise of Civil Government . . . ."); *Long Island Water-Supply Co. v.*

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[3] *Available at* http://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html (last visited May 29, 2009).

City of Brooklyn, 166 U.S. 685, 690 (1897) (finding that contracts are property subject to condemnation). Indeed, this Court has recognized that personal, as well as real, property is protected by the Clause. More to the point, it has recognized that the definition of "property" encompasses the most common repository of material value: money. *See, e.g., Brown v. Legal Found. of Washington*, 538 U.S. 216, 240 (2003); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162-64 (1980).

Justice Harlan observed over 100 years ago in *Village of Norwood v. Baker*: "[T]he power of the legislature . . . is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go, consistently with the citizen's right of property." 172 U.S. 269, 278 (1898). In *Norwood*, Justice Harlan concluded that "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation." *Id.* at 279. In other words, the taking of money without associated benefit was subject to, and precluded by, the protections of the Takings Clause. *Id.*; *see also Houck v. Little River Drainage Dist.*, 239 U.S. 254, 265 (1915) (taking claim may arise when a monetary exaction is a "mere confiscation of particular property").

More recently, this Court analyzed expropriations of money under the Fifth Amendment as a physical invasion of property. *See, e.g., Brown v. Legal Found. of Washington*, 538 U.S. at 234-35; *Phillips v. Washington Legal Found.*, 524 U.S. 156, 169-72 (1998); *Webb's Fabulous Pharmacies*, 449 U.S. at 163-64. For

example, in *Webb's Fabulous Pharmacies*, this Court found that a Florida law allowing a county court to expropriate the interest that was earned on the money held by the court during an interpleader action was tantamount to a physical taking. 449 U.S. at 164 ("The earnings of a fund are incidents of ownership of the fund itself and are property. . . . [A] State, by *ipse dixit*, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Takings Clause of the Fifth Amendment was meant to prevent."). This Court employed similar reasoning in *Brown v. Legal Foundation of Washington*, when this Court unanimously held that a state's expropriation of the interest earned on lawyer trust accounts constituted a *per se* physical taking of property. 538 U.S. at 235 ("[T]he interest earned [on money] . . . 'is the "private property" of the owner of the principle.' ") (quoting *Phillips*, 524 U.S. at 172).

Fairly read, *Eastern Enterprises*, 524 U.S. at 503-04, does not dilute this Court's jurisprudence indicating the exactions of money, without proportionate benefit, implicates a taking of "property" under the Fifth Amendment. After all, in *Eastern Enterprises*, the majority of justices recognized that an obligation to pay money to past employees was either subject to analysis under the Takings Clause or Due Process Clause. *Id.* at 523; *id.* at 540 (Kennedy, J., concurring in the judgment and dissenting in part). Both constitutional provisions require a deprivation of "property." Since there is no reason to believe the term has a different meaning in the Due Process Clause than in the Takings Clause, the fact that Justice Kennedy, in his concurrence in *Eastern Enterprises*, invoked due process to evaluate the monetary obligation supports, rather than undercuts,

the proposition that money is constitutionally protected "property." This status in turn should trigger takings protections as well as the guarantees of the Due Process Clause. W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 54 (2d ed. 1998) ("[T]he Fifth Amendment contains two important property guarantees," one that no person shall be "deprived of life, liberty, or property, without due process of law," and the other that "private property [shall not] be taken for public use, without just compensation.).

In sum, this Court's historic and modern property rights jurisprudence indicates that money, like other forms of personal property, is protected by the Takings Clause. James J. Holland, *"Taking" Another Look at IOLTA: Applying Loretto's "Per Se" Test to Government Exactions of Money*, 39 Williamette L. Rev. 219, 239 (2003) ("[T]he Framers intended the Takings Clause to protect against the physical appropriation of both real and personal property."); Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 Geo. L.J. 555, 588 (1997) (explaining that the original understanding of property encompassed "'not only tangible interests, but also values, beliefs, and opinions,' and personal possessions").

B. The Eleventh Circuit's Decision Conflicts with This Court's Understanding of Constitutionally Protected "Property"

The decision below cannot be squared with this Court's broad understanding of the property interests that are constitutionally protected. The Eleventh Circuit held that mandated subsidy payments to tobacco growers from a cigar maker was categorically

not subject to analysis under the Takings Clause: "Because 'no recognized property interest is implicated here, . . . there is no "taking."'" *Swisher*, 550 F.3d at 1056 (citation omitted). In contrast to the Constitutional Framers, who understood that the Takings Clause was designed "to protect property of *every sort*," including money, *see, e.g.*, Madison, *Property*, the Eleventh Circuit apparently believes that the Clause extends to far fewer interests, like those in land. *Swisher*, 550 F.3d at 1056-57. This categorical approach toward takings claims based on exactions of money is in manifest conflict with this Court's precedent and with the purpose of the Takings Clause—to protect property in all forms so as to preserve personal liberty. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) ("[T]he dichotomy between personal liberties and property rights is a false one. . . . That rights in property are basic civil rights has long been recognized."). Indeed the Eleventh Circuit neglects this Court's takings precedent addressing appropriations of money, even relegating many of these decisions to a footnote. *Swisher*, 550 F.3d at 1055 n.6. The decision below, holding that the Takings Clause utterly fails to protect a business against an approximately $10 million fee, is unsupported by this Court's Takings Clause jurisprudence, *Webb's Fabulous Pharmacies*, 449 U.S. at 163-64; *Brown*, 538 U.S. at 235, and the Court should grant review to resolve the conflict.

II

THE LOWER COURT'S DECISION THREATENS THE VIABILITY OF EXISTING LIMITATIONS ON THE GOVERNMENT'S POWER TO EXACT PROPERTY AS A LAND USE PERMIT CONDITION

The Eleventh Circuit's decision undermines this Court's precedent limiting the government's power to demand property as a condition of approving a land use permit. In particular, a *per se* rule that money is not property for purposes of the Takings Clause, encourages governments to evade the constraints this Court has imposed on permitting exactions simply by shifting from demands for real property to demands for cash.

A. *Nollan* and *Dolan* Established Limits on the Ability of Government To Demand Property in Exchange for a Building Permit

1. The *Nollan* and *Dolan* Standards

An exaction is a requirement that a property owner provide a benefit to the government in return for receiving permission to use land. Exactions can take any form, including dedications of land and cash payments. Steven A. Haskins, *Closing the* Dolan *Deal—Bridging the Legislative/Adjudicative Divide*, 38 Urb. Law. 487, 490-91 (2006). In *Nollan* and *Dolan*, this Court formulated the two-part essential nexus and rough proportionality test to determine whether an exaction constitutes an impermissible taking. First, the reviewing court must determine whether there is a connection between the exaction and the impact that would otherwise be caused by the unregulated use of

the owner's property. *Nollan*, 483 U.S. at 836-37. If an essential nexus exists, the court must decide whether the required exaction "is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. The burden of proving nexus and proportionality is on the government, not the property owner. *Id.* at 391 n.8. Proper application of this burden is essential to prevent a government entity from using its permit approval authority to coerce illegal exactions. An exaction that is not supported by nexus and proportionality is "not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Nollan*, 483 U.S. at 837 (citations omitted).

2. *Nollan* and *Dolan* Logically Apply to All Permit Exactions, Including Demands for Monetary Payments, and Many Courts Have So Held

Although *Nollan* and *Dolan* challenged exactions of real property interests, many local governments use impact fees—demands for cash payments as a permit condition—as a means of obtaining public benefits from permit applicants. *See* Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 Wm. & Mary L. Rev. 1513, 1519 (2006) (discussing the marked shift in local government financing from general revenue taxes to "nontax revenue raising devices" like exactions). Approximately 80% of jurisdictions impose impact fees on new development. Duncan Associates, *National Impact Fee Survey: 2008*, at 8 (Oct. 2008).[4] Between 2004 and 2008, the amount of money charged as an impact fee,

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[4] *Available at* http://www.impactfees.com/publications%20pdf/2008_survey.pdf (last visited May 29, 2009).

generally ranging from thousands to tens of thousands of dollars per new housing unit, grew an average of 76%, with some jurisdictions increasing fees up to 225% within that four-year period. *Id.* at 7. In some areas of California, for example, impact fees are estimated to have grown to approximately $80,000 to $90,000 per new home in 2008. Jim Wasserman, *Home Front: Impact Fees May Be the Next Battlefield for Area Builders*, The Sacramento Bee, Dec. 19, 2008, at 8B.[5] Impact fees are so pervasive that they affect nearly every aspect of housing, to the serious detriment of housing affordability. *See* Theo S. Eicher, *Growth Management, Land Use Regulations, and Housing Prices: Implications for Major Cities in Washington State*, at 10 (Feb. 2008) (Estimated cost of regulation and impact fees constitute nearly half the value of Seattle homes).

The "nexus" and "proportionality" rules articulated in *Nollan* and *Dolan* logically constrain governments from demanding excessive impact fees and other exactions of money that are not sufficiently related to the impact of the development on which they are imposed. *Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal. 1996) ("[W]e reject the proposition that *Nollan* and *Dolan* are entirely without application to monetary exactions. When such exactions are imposed . . . on an individual and discretionary basis, we conclude that the heightened standard of judicial scrutiny of *Nollan* and *Dolan* is triggered."). Although this Court has not directly addressed *Nollan* and *Dolan*'s applicability to impact fees, many lower courts have. They have generally concluded that an effective constitutional

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[5] *Available at* http://www.sacbee.com/736/story/1485548.html (last visited May 29, 2009).

limitation on governmental permitting power requires courts to construe *Nollan* and *Dolan* to apply equally to monetary and real property exactions. *See, e.g., City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995) (impact fees are subject to *Nollan/Dolan* analysis); *accord Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 641-42 (Tex. 2004); *San Remo Hotel L.P. v. City & County of San Francisco*, 41 P.3d 87, 102 (Cal. 2002); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 697-98 (Colo. 2001); *Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 353-56 (Ohio 2000); *N. Illinois Home Builders Ass'n, Inc. v. County of Du Page*, 649 N.E.2d 384, 388-90 (Ill. 1995); *Trimen Dev. Co. v. King County*, 877 P.2d 187, 191 (Wash. 1994).

Applying constitutional limits to monetary exactions advances public policy by allowing the government to charge money to off-set the impacts of a particular development, while preventing the government from forcing developers to pay or cede property to rectify problems they did not cause. *See* Fred P. Bosselman, Dolan *Works*, *in Takings Sides on Takings Issues: Public and Private Perspectives* § 14 (Thomas E. Roberts, ed. 2002).

3. The Decision Below Undermines the Limitations of *Nollan* and *Dolan*

The Eleventh Circuit's categorical rule that money is not property within the meaning of the Takings Clause conflicts with and undermines the understanding that impact fees and monetary exactions are subject to the constraints articulated in *Nollan* and *Dolan*. Lower courts often look to general precedent

involving the nature of "property" protected by the Takings Clause when faced with the question of whether an impact fee is subject to *Nollan* and *Dolan*'s takings standards. *See, e.g., McClung v. City of Sumner*, 548 F.3d 1219, 1225 (9th Cir. 2008); *Town of Flower Mound*, 135 S.W.3d at 635-40. The lower court's decision that "money is not property" will encourage governments to demand exorbitant cash payments as a permit condition, foreclosing the ability of affected property owners to invoke the protections of *Nollan* and *Dolan* in court. *McClung*, 548 F.3d at 1225.

There are important public policy reasons for avoiding this result. If governments can seek and obtain money as a permit condition free of *Nollan* and *Dolan*, they will use that route to obtain the same public benefits indirectly that they could not obtain directly. A government desiring to leverage the permit process to obtain a public trail on private property, as in *Nollan*, would simply demand enough money to purchase the desired real estate, rather than demanding a direct concession. *See, e.g.*, John M. Groen & Richard M. Stephens, *Takings Law, Lucas, and the Growth Management Act*, 16 U. Puget Sound L. Rev. 1259, 1299 (1993) ("*Nollan*'s nexus analysis is based on constitutional principles that do not change simply because the government demands money rather than land."). A property developer's right, under the Takings Clause, to be charged only for those impacts on infrastructure arising from his own development, rather than for a general societal problem, would be eviscerated by the simple expedient of a demand for a cash payment. This is exactly why lower courts have refused to create a "money" loophole in *Nollan* and *Dolan*. *Id.* at 1318; *see also* Haskins, 38 Urb. Law. at 496-501.

In adopting a *per se* rule that monetary obligations are not subject to takings analysis, the Eleventh Circuit's decision threatens the viability of *Nollan* and *Dolan* as effective limits on governmental permitting powers. This Court should review the decision below to clarify that there is no *per se* rule against takings claims based on monetary fees, and to ensure that the functioning *Nollan* and *Dolan* regime is not destroyed by such a rule. *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring) ("The temptation to adopt what amount to *per se* rules . . . must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances . . . .").

CONCLUSION

For these reasons, Amici respectfully request that the petition for writ of certiorari should be *granted*.

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Respectfully submitted,

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